Supreme Court, U.S.
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No. 98-1076

In The

Supreme Court of the United States

October Term, 1998

PORTLAND 76 AUTO/TRUCK PLAZA, INC.,

Petitioner,

v.

UNION OIL COMPANY OF CALIFORNIA, dba UNOCAL,
NATIONAL AUTO/TRUCKSTOPS, INC.

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

REPLY BRIEF OF PETITIONER

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15 U.S.C. § 13(e) (Section 2(e) of the Robinson-Patman
Act) ..... *passim*

REASONS FOR GRANTING THE WRIT

Portland 76 seeks review of the Ninth Circuit's holding that "facilities" designed to promote the resale of a commodity, when located on leased property, are not "facilities" as that word is used in section 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e). A three judge panel of the Ninth Circuit concluded that section 2(e) of the Robinson-Patman Act contains a non-textual "leased property" exception. From that premise, the panel held the facilities at a leased truckstop designed to promote the resale of fuel are not "facilities" under section 2(e).

As demonstrated in Portland 76's petition, the Ninth Circuit's analysis in this case is flawed in numerous respects. By creating a judicially made, non-textual exception to section 2(e), the Ninth Circuit ignored the plain meaning of the Robinson-Patman Act. In reaching its conclusion, the Ninth Circuit disregarded the legislative history of the Act and misapplied regulations promulgated by the Federal Trade Commission.[1] The Ninth Circuit's analysis creates a conflict in principle with its own case law as well as with case law from other circuits. Finally, the Ninth Circuit's opinion, if permitted to stand, will allow any franchisor with basic drafting skills to evade altogether the Robinson-Patman Act.

In its response to Portland 76's petition, Unocal obfuscates the arguments raised in Portland 76's petition. In an apparent attempt to distract this Court from the issues presented by Portland 76's petition, Unocal simply miscasts the facts and

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[1] The Federal Trade Commission ("FTC") is the federal agency primarily responsible for enforcement of the Robinson-Patman Act. The FTC never has applied (or encountered) the "leased property" exception as a defense to FTC complaints based on discrimination. In considering whether to grant the writ, this Court may want to invite comment from the FTC regarding the Ninth Circuit's creation of the "leased property" exception.

the case that were presented to the jury. From that misstatement of the case, Unocal attempts to defend the Ninth Circuit's opinion. Unocal's recitation of the case, and the arguments it presents for denying the writ, are misplaced.

A. The Jury Concluded that Unocal Had Discriminated in the Distribution of "Facilities" Under the Terms of the Fuel Resale Agreement.

The facts in this case are not legitimately in dispute. Unocal and Portland 76 entered into two separate agreements. The first agreement was for the resale of fuel; the second agreement was for the lease of a truckstop. Portland 76 argued to the jury, and on appeal, that under the fuel resale agreement, Unocal had discriminated in the provision of promotional facilities at the truckstop. Unocal does not claim that it discriminatorily provided those facilities because of its obligations under the truckstop lease. Unocal does not contest that the improvements at issue were provided to promote fuel sales, placing them squarely within section 2(e). Nevertheless, Unocal argues that it was permitted to discriminate in its provision of promotional facilities under the fuel resale agreement because those facilities were located on leased property.

Unocal now contends that at trial Portland 76 argued only that Unocal had discriminated in its provision of the truckstop as a single entity. Unocal inaccurately asserts that neither judge nor jury "consider[ed] whether facilities at the truckstop could be 'facilities' under section 2(e)." Response at 2. See also Response at 4-5 (reiterating the same argument). That argument is untrue. At trial, Portland 76 presented detailed comparisons regarding the expenditures that Unocal had made to the individual facilities at the Portland 76 truckstop, in contrast to the expenditures made by Unocal on facilities at other

truckstops. Even the Ninth Circuit recognized that there was evidence showing discrimination in the provision of specific truckstop facilities.

> "The jury heard that the truckstop's highway signs needed to be replaced, the roof leaked in the restaurant, the showers were in bad condition, the heating and air conditioning in the restaurant were inadequate, the parking lot was full of potholes, the sewage system stank on hot days, and the fuel lanes were too narrow."

App. 4. The jury was instructed at least nine times to consider whether Unocal had discriminated against Portland 76 in the furnishing of "facilities." App. 47-49. In the form of verdict, the jury concluded that Unocal did "violate the Robinson-Patman Act in connection with the furnishing of facilities to Portland 76." App. 41.

The case decided by the jury was about whether Unocal discriminated against Portland 76 in the provision of truckstop *facilities*. As Portland 76 made clear in its petition, one of the many analytical flaws in the Ninth Circuit's opinion involved the linguistic gymnastics undertaken by that court in order "to convert the *facilities* at the truckstop into the truckstop itself." Petition at 10-11. It its response, Unocal depends on the Ninth Circuit's error to support its position. Response at 5. Without that error, Unocal has little on which to rely.

B. Unocal Asks This Court to Ignore the Plain Meaning and Legislative History of Section 2(e) of the Robinson-Patman Act.

As demonstrated in Portland 76's petition, the Ninth Circuit ignored the plan meaning of section 2(e). Petition at 10-18. Unocal baldly asserts that the Ninth Circuit's interpretation

of the Section 2(e) is so patently and clearly correct "that nothing further need be said." Response at 7. However, even the Ninth Circuit explicitly recognized that the statutory interpretation issues presented by this case are "especially difficult." App. 2.

Unocal apparently acknowledges that in interpreting section 2(e), a reviewing court should look at both the language of the statute and the legislative history surrounding the passage of that statute. Response at 10-11. Yet, Unocal simply ignores the fact that the plain meaning of the word "facilities" clearly includes the promotional facilities at the truckstop. See Petition at 9-12; App. 6. Unocal also ignores the fact that section 2(e) applies to all "purchasers" of commodities, not just those purchasers who own the land on which they resell commodities. Moreover, Unocal (like the Ninth Circuit) altogether fails to cite any legislative history surrounding the passage of the statute that supports the argument that Congress intended to exclude facilities on leased property from the protections enacted in section 2(e).

In defense of the Ninth Circuit's opinion, Unocal mistakenly embraces the Ninth Circuit's reliance on Hinkleman v. Shell Oil Co., 962 F.2d 372 (CA 4 1992), cert. denied, 506 U.S. 1041 (1992) and Export Liquor Sales, Inc. v. Ammex Warehouse Co., 426 F.2d 251 (CA 6 1970) cert. denied, 400 U.S. 1000 (1971). Response at 7-8. Even the Ninth Circuit questioned the analytical value of those opinions. App. 9-10. Unocal does not contend that the analyses underlying those two cases are correct; rather, Unocal simply asserts that the "results there mirror the result here." Response at 7. That is an insufficient reason to permit a flawed opinion to stand.

C. *Unocal Overlooks the Inter and Intra-Circuit Conflicts in Principle That Arise as a Result of the Ninth Circuit's Opinion.*

In its petition, Portland 76 illustrated how the Ninth Circuit's opinion created various conflicts *in principle* with this Court's and other circuit court's reading of the text and legislative history of the Robinson-Patman Act. Petition at 19-25. Unocal argues that, because there is no explicit conflict between the holding in this case and the holdings from this Court and the other circuits regarding the interpretation of the word "facilities" in section 2(e) of the Robinson-Patman Act, there is no conflict in principle. See Response at 8-9, (citing Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923)). In so arguing, Unocal misstates Portland 76's argument.

Portland 76 recognizes that this Court never has decided whether "facilities" on leased property are "facilities" within the meaning of section 2(e). What Portland 76 argued in its petition, and reiterates here, is twofold. First, this Court has stated that non-textual limitations should not be added to provisions of the Robinson-Patman Act. Second, other circuit courts have applied an analytical construct in interpreting provisions of the Robinson-Patman Act that, if followed by the Ninth Circuit here, would have led to a different conclusion. Petition at 19-25.

Unocal also improperly criticizes Portland 76 for citing in its petition George Haug Co., Inc. v. Rolls Royce Motor Cars Inc., 148 F.3d 136 (CA 2 1998). Portland 76 discussed Haug in its petition to show that the Second Circuit recently treated leased premises as "facilities" for purposes of section 2(d) of the Robinson-Patman Act. Petition at 20-21. Portland 76 has not argued (as Unocal implies) that the case presented here is identical to the case presented in Haug.

D. Unocal Disregards the Broad Economic Impact That the Ninth Circuit's Opinion Would Have If Allowed to Stand.

Unocal ignores the fact that if the Ninth Circuit's opinion is allowed to stand, franchisors and wholesalers easily will be able to evade the Robinson-Patman Act. That clearly would undermine the goals of the Act. Unless review is granted, franchisors and wholesalers will be able to structure their economic relations with commodity resellers in a way that avoids the intent and purpose of the Robinson-Patman Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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